

REMARKS

STATUS OF CLAIMS

Claims 1-21, 23-37, and 61 are pending in the application and are rejected. Minor amendments have been made to claims 1, 33, 37, 61. No new matter has been added. Support in can be found in the specification as originally filed.

In light of the arguments and comments below, reconsideration and allowance of the present application are respectfully requested.

INTERVIEW SUMMARY

Applicants' representative, the undersigned attorney, conducted a telephonic interview with the Examiner on April 2, 2010. Applicants and the undersigned attorney would like to thank the Examiner for his time and the courtesies extended during the interview. The independent claims were discussed, with independent claim 1 being representative, in view of the rejection under 35 U.S.C. §103 over Kimball et al. '046 and the rejection under 35 U.S.C. §112.

REJECTIONS UNDER 35 U.S.C. §112

The Examiner rejected claims 1-21, 23-37 and 61 under 35 U.S.C. 112, first paragraph as failing to comply with the written description requirement. The Examiner states the claims contain subject matter that is not described in the specification in such a way as to reasonably covey to one skilled in the relevant art that the inventor(s) had possession of the claimed invention at the time that the application was filed. The Examiner states that the claims now recite that the device derives an indication of the degree of perfusion failure from blood flow measurements, in combination with at least one of pH and PCO2 measurements. The Examiner states that the specification states that such an indication may by derived but it does not state that it is derived by the device. Applicants traverse the rejection and respectfully request reconsideration.

Preliminarily, Applicants note that claim 37 was not rejected by the Examiner under §112. However, Applicants comments herein also apply to claim 37. As discussed with the Examiner, the limitation “wherein given a measured blood flow in the adjacent tissue that is substantially lower than a normal measured blood flow and a PCO₂ measurement that is substantially higher than a normal PCO₂ measurement the device derives the assessment of systemic perfusion failure in the patient” is fully supported and enabled by the specification. Based on the knowledge one of ordinary skill in the art possessed at the time the application was filed, one of ordinary skill in the art would fully comprehend how the device derives the indication and/or assessment of systemic perfusion failure in the patient. In other words, the claim is “self-enabled.” For example, one of ordinary skill in the art would understand how to use a computer to perform the stated comparisons to eliminate human error in the measurements. One of ordinary skill in the art would also understand, based on his or her own knowledge at the time the application was filed, how to use a computer to set range checking for the measured parameters as well as rapid data comparison so that clinically meaningful outputs could be configured. All of the foregoing was within the purview of one of ordinary skill in the art at the time the application was filed.

REJECTIONS UNDER 35 U.S.C. §103(a)

The Examiner rejected claims 1-21, 23-38, and 61 under 35 U.S.C. 103(a) as being unpatentable over Kimball et al, U.S. Patent 6,258,046 (“Kimball”). The Examiner stated that the present application has an effective date of 09/23/2003 and Kimball was patented 07/10/2001 and is thus available as a 102(b) reference. The Examiner stated that Kimball discloses all of the claimed features of the present application, except Kimball does not derive an indication of the perfusion failure. The Examiner stated that Kimball rather teaches that an increased PCO₂ relative to normal, a decreased pH relative to normal, and blood flow that is substantially lower than normal, and indicators in combination, of perfusion failure. The Examiner stated that it would have been obvious to modify Kimball to use a computer to perform the stated comparisons to eliminate human error in the measurements.

Applicants traverse the rejection and respectfully request reconsideration. Kimball et al. '046 is not a §102(b)/103 reference to the present application. The claims are fully supported by Kimball et al. '046. See, e.g. col. 3, lines 18-28 and col. 3, lines 48-52. Therefore, Applicants believe such support obviates the rejection under 35 U.S.C. §103 over Kimball et al.

CONCLUSION

All rejections having been addressed, Applicants respectfully request that a Notice of Allowance be issued in this case. In the event a telephone call would expedite the prosecution of this application, the Examiner may reach Barbara Wrigley at (612) 607-7595.

Applicants hereby petition for a two-month extension of time, the three-month statutory period having expired on February 5, 2010 and the present response being filed on or before April 5, 2010. The Commissioner is hereby authorized to charge or credit any such extension fees or overpayment to Deposit Account No. 50-1901 (Reference 11242-320/US).

Respectfully submitted,

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